United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

89

UNITED STATES COURT OF APPEALS
For The
DISTRICT OF COLUMBIA CIRCUIT

No. 24,274

ELAINE W. KERR,

Appellant

CLAUDIA H. BORTHWICK,

Appellee

On Appeal From An Order Of The
United States District Court
For The District Of Columbia

APPELLANT'S BRIEF

Elaine W. Kerr, Attorney
and Appellant
310 Hillwood Avenue
Falls Church, Va. 22046

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

NO. 24,274

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Appellant

v

CLAUDIA H. BORTHWICK,

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UNITED STATES COURT OF APPEALS
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Appellant

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LIST OF OMISSIONS

Appellant respectfully requests that the following List of Omissions be added to Appellant's Brief by inserting same as indicated herein below:

1. As required under Rule 8(d) of the Rules of this Court, appellant states that this appeal is before this Court for the first time and it has not been before this Court under the same or similar title at any prior time. References to Rulings: The right to appeal was granted by this Court by an order entered in Misc. No. 3532 on April 21, 1970. Copy of said Order, (App. 39-40).

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STATEMENT OF ISSUES OR QUESTIONS PRESENTED FOR REVIEW

This appeal, in addition to the adoption by reference of Appellant Benn's Brief, timely filed in this case, this Appellant presents the following issues or questions for review:

1. Should the District Court have granted this Appellant's Motion to Dismiss, in light of the fact that the Appellee's Affidavit dated December 12, 1969 filed in Opposition to Motions to Dismiss, is clearly and directly in contradiction to Appellee's written Agreements and Covenants of April 12, April 19, and April 21, 1969, particularly when Appellee's Counsel in writing contradicts Appellee's said Affidavit of December 12, 1969, with regards to the Secured Loan which Appellee offered to make and did make to Defendant Benn for which Loan Appellee received a $45,000.00 Deed of Trust Note dated March 31, 1969, payable to Appellee, secured by properties located in Rosslyn, Virginia owned by Capital Investors Co., maker of said Note.

2. Does the amended complaint state a claim upon which relief can be granted in the light of Appellee's Affidavit of December 12, 1969 which contradicts clearly and directly the substance of her amended complaint based in Agreements entered into by Appellee; in that the Appellee states that she has no knowledge of any Assignment of any properties involved in her

complaint, which completely negates Appellee's executed Agreement of April 12, 1969, and other executed writings?

3. Should, in the circumstances, Plaintiff's Counsel letter to Defendant Benn's then Counsel dated August 28, 1969 be permitted in evidence which contradicts or impeaches Plaintiff's Affidavit dated December 12, 1969 regarding the Secured Loan for which the Plaintiff received a $45,000.00 Deed of Trust Note therefore dated March 31, 1969, should this Appellant, as to her, be entitled to a dismissal of these proceedings?

4. Should this action be dismissed on the ground that since there actually exists a Necessary and Indispensible party in this case which Appellee has failed or refused to join?

This Appellant hereby seeks to envoke FRCP, Rule 21(h)(2) particularly since Frances K. Mager is claiming an interest in the identical subject matter before this Court, and said Mager has asserted said opposing interest and claims $100,000 in damages as shown and alleged in the pending litigation before the United States District Court for the Eastern District of Virginia, (Alexandria Division) styled as, Frances K. Mager vs. Elaine W. Kerr vs. the Travelers Insurance Companies (third party Defendants) Civil Action No. 187-70-A.

STATEMENT OF THE CASE

This Appellant is leaving aside the main thrust of Statement of the Case since this Appellant has adopted by reference Appellant Benn's Brief, and will attempt to confine her brief along the lines as set forth in Points V, VI, VII, and VIII and the Statement of Issues or Questions which this Appellant is presenting for Review.

The District Court denied this Appellant's Motion to Dismiss, but entered an Order on February 27, 1970 authorizing Appellant under Title 28 United States Code, Section 1292(b), the Court having ruled that this case involves a controlling question of law as to which there is substantial ground for difference of opinion. Appellant applied for permission to appeal, and her application was granted on April 21, 1970.

The basic facts, taken principally from allegations contained in the amended complaint, are as follows: Appellee is a citizen of Maryland and Appellant is a citizen of Virginia.

The amended complaint then goes on to allege, among other things that this Appellant aided and abetted the efforts of Defendant Benn to induce and pursuade Plaintiff to go along with the efforts of Defendant Benn. That on April 12 a formal typewritten rescission was prepared rescinding the transaction between James T. Benn and Claudia H. Borthwick (App. 9). And on April 19, 1969 a writing was entered into by Appellee

and Appellant Benn (App. 10). The complaint seeks restitution and damages against this Appellant.

This Appellant's Affidavit in support of Motions filed in this case (App. 5), states that she met the Appellee for the first time with respect to the subject matter involved in this case on April 10, 1969 at approximately 6 o'clock p.m. in this Appellant's law offices, 310 Hillwood Avenue, Falls Church, Virginia (App. 6).

That the Appellee stated to this Appellant at said time and date that the Appellee made a loan to Defendant Benn (App. 6), And received security therefor in the form of a Deed of Trust Note in the amount of $45,000.00 dated March 31, 1969 payable to the Appellee or her Order, made by Capital Investors Co. (App. 8).

That after some discussion between the Appellee and Appellant Benn the said Loan for which Appellee had received the said $45,000.00 Deed of Trust Note was converted to an arrangement whereby Appellee desired to <u>exchange</u> the said Loan into an investment as set forth in the Agreement dated March 31, 1969 (App. 11). Said Agreement provided for a rescission at the option of the Appellee at any time.

As a result of said meeting on April 10, 1969 with Appellee this Appellant prepared the rescission agreement dated April 12, 1969 (App. 18) and both the Appellee and Appellant Benn affixed their respective signatures thereto, with the understanding between them that Appellant Benn be granted a two

week period within which to collect the properties or the equivalent thereto as required by the said rescission agreement (App. 21).

Appellant states in her Affidavit that on April 18, 1969 the Appellee telephoned for an appointment which was set up for six o'clock p.m. (App. 8). Appellant Benn was present at this six o'clock meeting, and as a result thereof, this Appellant prepared an agreement rescinding the April 12, 1969 rescission agreement, said agreement rescinding the rescission agreement is dated April 19, 1969 (App. 22). The reason Appellee gave to this Appellant was that she had another attorney other than this Appellant to inspect the property and examine all documents of record and that the said other attorney advised her that the exchange transaction was a good deal, nevertheless this Appellant retained for the Appellee her further desire, if Appellee so wished, to rescind.

This Appellant did not, directly or indirectly, use any means or instruments of transportation or communication in interstate commerce, nor did she, directly or indirectly, use the mails in the consummation of any of the acts complained of (App. 10).

This Appellant was present when and at the time on April 12, 1969 in your Appellant's office, Appellant Benn informed Appellee that Appellant Benn would require approximately two weeks to collect the properties and monies or the equivalent thereto for delivery to Appellee in conformance with rescission (App. 7).

This Appellant states in her Affidavit that Appellee thereafter retained counsel who now represents Appellee in pending action and who requested rescission of the exchange agreement dated March 31, 1969 (App. 11), and this Appellant states that she is in receipt of a letter setting forth the rescission understanding as demanded by the Appellee, which rescission is now pending (App. 32).

This Appellant received a telephone call from the Appellee at approximately 12 o'clock M, on April 21, 1969, and requested this Appellant to meet the Appellee at the corner of 20th & M Streets, N. W., Washington, D. C. to accompany the Appellee to the offices of Penn Mutual Life Insurance Company in Washington, D. C., at which offices, according to the Appellee, she was required to sign in the presence of an insurance company employee the Assignment of the Insurance Contract which the Appellee had originally assigned to Appellant Benn on March 31, 1969 as set forth in said March 31, 1969 agreement (App. 9).

The amended complaint does not allege that this Appellant in any respect actually violated any of the Acts involved here, anywhere including the District of Columbia. The record shows that this Appellant was not "found" or served with process, or that any "offer or sale took place" within the District of Columbia.

POINT V

Should Plaintiff's Affidavit Dated December 12, 1969 Filed In Support Of Opposition To Motions To Dismiss, Be Given Credence When It Clearly and Directly Contradicts Plaintiff's Agreements and Covenants Made In Writing On April 12, April 19 and April 21st, 1969, Regarding The Secured Loan To Defendant Benn.

The Appellee in her Affidavit dated December 12, 1969 swears that;

"All statements in the affidavits filed by James T. Benn and Elaine W. Kerr that I offered to make a secured loan to Defendant Benn are untrue." (App. 31).

Yet, in the Rescission Agreement dated April 12, 1969 the Appellee acknowledges;

"Further party of the first part hereby acknowledges receipt of a Promissory Note in the amount of $45,000.00". (App. 19).

Appellee in the same Rescission Agreement dated April 12, 1969, acknowledges, confirms and ratifies receipt of;

"(b) a Promissory Note in the principal amount of $45,000.00 payable to the Order of Claudia H. Borthwick and signed by Capital Investors Co.," (App. 20).

Further, in the Agreement to Rescind the Rescission Agreement dated April 12, 1969, the Appellee warranted and represented that the;

"Promissory Note in the face amount of $45,000.00 payable to her Order made by Capital Investors Co., dated March 31, 1969, has been lost or misplaced and that Claudia H. Borthwick will execute a Lost Instrument Affidavit." (App. 26).

Further corroborating that a $45,000.00 Deed of Trust secured Promissory Note was delivered to Appellee to secure a loan originally made by the Appellee and then converted to an exchange of properties as set forth in the March 31, 1969 Agreement (App. 11), and that Appellee received the said Secured $45,000.00 Deed of Trust Note Appellee's Counsel of Record as offered to return the said Lost $45,000.00 Deed of Trust Note dated March 31, 1969, made by Capital Investors Co. (App. 33).

Herein is a condensed resume and chronology of the Secured Loan Agreement, Exchange Agreement, Rescission Agreement and Agreement Rescinding the Rescission Agreement:

(i) Prior to March 31, 1969 the original agreement and arrangement between Appellee and Appellant Benn was a Secured Loan, at which time the Appellee received the said $45,000.00 Deed of Trust Promissory Note (Benn's App. 18), (Kerr's App. 6);

(ii) On March 31, 1969 the said Secured Loan was converted to an arrangement whereby Appellee desired to exchange the identical properties, for which Appellee received the said Secured $45,000.00 Deed of Trust Note, and the Appellee at this time received one and one half shares of stock owned and in the name of Appellant Benn issued by Capital Investors Co., (Benn's App. 18, Exhibit C to Appellant Benn's Affidavit);

(iii) On April 12, 1969 the Appellee desired to Rescind the transaction entered into with Appellant Benn and a Rescission Agreement was entered into between the two principals bearing the same date (App. 18);

(iv) On April 19, 1969 the Appellee desired no longer to rescind the transaction as set forth in the April 12, 1969 Rescission Agreement but, instead desired to rescind the Rescission Agreement of April 12, 1969 and fully reinstate the March 31, 1969 Exchange Agreement (App. 22).

This Appellant relied upon the Statements as told to her by the Appellee during the first interview on April 10, 1969 (App. 6), and further relied upon the Appellee's as to what transpired between the Appellee and Appellant Benn during their negotiations and arrangements for the said Secured Loan which was later converted to an Exchange of Properties for which Appellee received one and one-half shares of stock from

Appellant Benn, issued to Appellant Benn by Capital Investors Co. several years prior to March 31, 1969.

This Appellant has no independent knowledge as to what transpired prior to April 10, 1969, between Appellee and Appellant Benn.

The Rescission Agreement sets forth that Appellee did receive the said Secured $45,000.00 Deed of Trust Note dated March 31, 1969 payable to Appellee's Order, maker of said Note is Capital Investors Co. The receipt of said Secured $45,000.00 Note by the Appellee is further corroborated by her Counsel of Record, who on August 28, 1969 as offered to return the said $45,000.00 Deed of Trust Note to Appellant Benn (App. 32).

A Promissory Note duly executed is evidenced that an indebtedness exists between the Payee and the Maker, subject however to offset and defenses. In instant case the Payee swears on oath in her Affidavit dated December 12, 1969 filed in this case (App. 31), and without any qualification states that all statements with respect to the fact that the Appellee offered to make a secured loan to Appellant Benn are untrue. Yet, both the Appellee and her Counsel of Record offer to return the said secured $45,000.00 Deed of Trust Note dated March 31, 1969 to Appellant Benn.

One might inquire as to whether the said Appellee's Affidavit was made as an improvisation to meet the exigencies of the moment that she felt or thought was involved and required

at that time in the pending case.

POINT VI

Should Plaintiff's Affidavit Dated December 12, 1969 Made In Support Of Opposition To Motions To Dismiss, Be Given Credence When It Clearly and Directly Contradicts Plaintiff's Written Agreements and Covenants Of April 12,1969 Regarding Her Knowledge Of The Assignment And Transfer To Third Parties Of Properties Involved In Her Complaint.

Appellee swears in her Affidavit, dated December 12, 1969, that;

"I neither made direct assignment nor consented to the transfer of any properties involved in my complaint, and no such property was transferred with my knowledge or consent." (App. 31);

The Appellee did make a direct assignment thereby consenting to the transfer of the properties involved in her complaint to Defendant Benn as set forth in the Exchange Agreement dated March 31, 1969 (App. 11).

Appellee further states on oath that;

"The statements appearing in the pleadings filed by Defendants Benn and Kerr alleging that properties involved in these proceedings were transferred to third parties by direct assignment and with my knowledge and consent, are all untrue."

The Appellee in addition to executing the Exchange Agreement dated March 31, 1969 (App. 11), she executed separate Assignments for each item of property involved in these proceedings and as set forth in the said March 31, 1969 Agreement at, App. 12, App. 13, and App. 14. The said separate and distinct Assignments over and above the overall Assignment as set forth in App. 12 at Paragraph 1, thereof was for the purpose of assigning to third parties any one or more of the properties involved in these proceedings, but less than all of the properties. Appellant Benn had no further need of any further writings assigning the properties involved here.

On March 31, 1969, Kenneth B. Friedlander agreed to purchase from Appellant Benn the properties involved in these proceedings, and as part of the terms and conditions of purchase Friedlander requested a direct assignment from the Appellee, to whomsoever said Friedlander designated, in order to expedite the handling of the Securities involved through stockbrokers. As a result thereof said Friedlander prepared the direct assignments of the properties involved here to whomsoever he named and the Appellee signed said direct assignments.

Further, in the Rescission Agreement dated April 12, 1969, the Appellee acknowledged that she had full knowledge that the properties involved in her complaint had been assigned to third party (App. 20, Paragraph 3);

Again, in the said Rescission Agreement the Appellee acknowledges that;

"(5) The party of the first part hereby acknowledges that has knowledge that the properties referred to in paragraph (3) herein have been assigned and delivered to third parties and that the total sum thereof or the identical properties delivered by the party of the first part to the second part shall be returned to the party of the first part or the equivalent thereof or in the option (exclusive) the party of the second part may purchase on the market similar properties having the values as set forth in said Agreement dated March 31, 1969." (App. 21, Paragraph 5).

Kenneth B. Friedlander, Appellant Benn and the Appellee stated to this Appellant at various times, in substance and effect that the said Friedlander required a direct assignment from the Appellee in order to expedite handling of the Securities involved here. This was confirmed to me by the Appellee during her first meeting with me at my office on April 10, 1969, and was again reviewed on April 12, 1969 at the time the Rescission Agreement was drawn in my office in the presence of Appellant Benn (App. 6 and App. 20, at Paragraph 3, and App. 21 at Paragraph 5).

POINT VII

In The Circumstances Should Plaintiff's Counsel Letter To Defendant Benn's Then Counsel, Dated August 28, 1969 Be Permitted In Evidence To Contradict Or Impeach Plaintiff's Affidavit Dated December 12, 1969 Regarding The Return Of The Promissory Note For $45,000.00 Dated March 31, 1969 Payable To Plaintiff, Issued By Capital Investors Co., Involved In The Secured Loan To Defendant Benn.

On August 28, 1969 Counsel of Record for Appellee in a letter bearing same date offered to return to Appellant Benn the following:

"....the Promissory note for $45,000.00, dated March 31, 1969, issued by Capital Investors Co." (App. 33).

The foregoing further corroborates the fact that a $45,000.00 Deed of Trust Note dated March 31, 1969 was delivered to the Appellee in exchange for a loan in the form of the properties involved here which Secured Loan the Appellee desired to convert to an arrangement whereby an exchange of properties was made between the Appellee and Appellant Benn, whereby the Appellee received one and one-half shares of stock owned by Appellant Benn, at one time years prior to March 31, 1969, issued by Capital Investors Co. to Appellant Benn. (App. 5).

Yet, the Appellee in her sworn statement denies that a Secured Loan was offered by her to Appellant Benn. (App. 31 - 32).

POINT VIII

Plaintiff's Opposition To Motions To Dismiss At Paragraph 7 Thereof, Made Statement of Fact That There Are No Indispensible Parties In This Case And No Evidence Exist Such Indispensible Parties Is Not To Support Any Showing That Such Parties Exist Or Claim An Interest Relating To The Subject Of This Action, Whereas, In Contradiction Of Said Statement One Of The Indispensible Parties, Frances K. Mager Has Long Since Filed Suit Against This Appellant Relating To The Very Subject Matter Involved In This Action

This Appellant seeks to invoke Rule 19, Federal Rules of Civil Procedure in conjunction with Rule 12(h)(2), Federal Rules of Civil Procedure, with the defense of failure to join an indispensible party or parties in these proceedings.

• Frances K. Mager claims not only to have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. Mager claims in her pleadings in effect that she is an indispensible party.

• Frances K. Mager is claiming an interest in the identical subject matter before this Court, the said Mager has asserted an opposing interest and claims one hundred thousand dollars damages, in the pending litigation before the United States District Court for the Eastern District of Virginia, (Alexandria Division) styled as, Frances K. Mager vs. Elaine W. Kerr vs.

the Travelers Insurance Companies (third party Defendants) Civil Action No. 187-70-A.

This defense may be made as late as the trial on the merits, and the matter is so vital that an Appellate Court, sua sponte, if necessary, may consider it although the point was not raised in the trial court, Moore's Federal Practice, Sections 19.05(2), 19.19.

"Failure to join an indispensible party may render a judgment against a defendant violative of due process." Western Union Telegraph Company vs. Commonwealth of Pennsylvania 368 US 71, 82 S Ct 199, 7 L ed2d 139; Moore's Federal Practice, Section 19.01-1(2).

The object of this Brief is a Motion to Dismiss these proceedings against this Appellant, and the errors urged here, are selected as representative and not exhaustive:

(1) The Appellee in her sworn statements as contained in her Affidavit dated December 12, 1969, that she did not offer to make a secured loan to Appellant Benn. Yet, she and/or her Counsel are in possession of a Secured $45,000 Deed of Trust Note; dated March 31, 1969, which Appellee received from Appellant Benn at the time she made the said Secured Loan as set forth hereinabove.

(2) The Appellee has sworn on oath that she has no knowledge of the fact that the properties in controversy here, were assigned

to third parties and said acknowledgment was reduced to writing in the said Rescission Agreement dated April 12, 1969.

(3) Though the defense of failure to join indispensible parties was made by Appellant Benn, this Appellant did not raise this point in the Court below. However, Frances K. Mager is claiming an opposing interest, involving the same subject matter as in these proceedings, and has filed a law suit against this Appellant and the Travelers Insurance Companies as third party defendant. This failure to join indispensible parties was opposed by the Appellee and as a reason stated that it was not supported by any showing that such persons claimed an interest relating to the subject matter involved in the complaint. However, that reason or ground is no longer available to the Appellee.

(4) The amended complaint completely fails to allege that this Appellant, in any respect violated either of the two Acts invoked here by the Appellee, or that this Appellant breached "any duty" or assumed "any liability" prescribed by either of the said Acts and as a result this Appellant respectfully contends, that the District Court lacks jurisdiction over the instant action because

(a) The record clearly shows that this Appellant was not "found" or served with process in the District of Columbia;

(b) The amended complaint admits on its face that this Appellant is not an inhabitant of the District of Columbia;

(c) The amended complaint fails to allege that this Appellant transacts business in the District of Columbia;

(d) The amended complaint fails to allege that any "offer or sale took place" in the District of Columbia or that any "act or transaction constituting violation" of the Securities Exchange Act "occurred" within the District of Columbia;

(e) Simultaneously, however, the Affidavit of this Appellant (an attorney) and Appellant Benn, neighter which have been contradicted by Appellee, state that all contractual transactions between the parties "took place" in Virginia.

(f) That the transaction between the Appellee and Appellant Benn is a private exchange of their respective properties which each exchanged, assigned and delivered to the other "took place" in Virginia.

(g) This Appellant did not by means of wire, sound or telephone call, communicate with Appellee from the District of Columbia to Silver Springs, Maryland, nor did this Appellant transport or cause to be transported from the District of Columbia to Virginia any securities whatever at any time belonging to Appellee or ever owned by Appellee.

(h) The only activity or function "participated in" by this Appellant in the instant case, is that, this Appellant

represented the Appellee at the Appellee's request, to obtain for the Appellee a Rescission of the transaction the Appellee entered into with Appellant Benn. This Appellant "was successful" in obtaining the Rescission Agreement for the Appellee signed by Appellant Benn on April 12, 1969, and on April 19, 1969 the Appellee refused to perform on the Rescission Agreement and requested a new Agreement Rescinding the Rescission Agreement and in this too this Appellant "was successful". All discussion, conferences, drafting and the signing of all Agreements and writings insofar as this Appellant is concerned "took place" in Virginia.

Accordingly, for all the foregoing reasons, it is respectfully submitted that the decision of the District Court is clearly erroneous in failing to grant the Motion to Dismiss on the grounds that it lacked jurisdiction over the subject matter and this Appellant.

Respectfully submitted,

August 5, 1970

Elaine W. Kerr, Appellant
310 Hillwood Avenue
Falls Church, Virginia

DLB-EA1-Gignoux
1-27-71

UNITED STATES COURT OF APPEALS

For The

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No. 24,274
~~No. 24,280~~

James T. Benn and
Elaine W. Kerr,

Appellants.

Claudia H. Borthwick,

Appellee.

On Appeal From An Order Of The
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APPELLEE'S BRIEF

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Point III Whether the sworn allegations in the Complaint that Appellant Benn contracted to sell and sold securities to Appellee Borthwick in the District of Columbia in violation of Title 2, Sections 2402 and 2413, of the District of Columbia Code state a cause of action that may be tried in the District of Columbia? 1

Point IV Should the action be transferred where there is no clear showing that the proposed transferee district is a more convenient one and that the interests of justice would be better served by a trial there? 1

Point V Whether Appellant Kerr can rely on the agreement dated April 19, 1969, prepared by her and with her advice as attorney for appellee to revoke the earlier April 12, 1969, rescission agreement also prepared with her advice to attack the credibility of appellee's affidavit in opposition to the motions to dismiss when the complaint cites preparation of the agreements by Appellant Kerr as counsel for appellee

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court ruled correctly and within its discretionary power in finding that service of the Summons and Complaint was valid where the United States Marshal certified appellants were served personally?

II. Whether the provisions of Section 22(a) of the Securities Act of 1933 (15 USC 77v(a)) providing that any process in all suits in equity and actions at law brought to enforce any liability or duty created thereunder may be served in any other district of which defendant is an inhabitant or wherever the defendant may be found validate the service on appellants when the complaint relates to a sale admitted to have been made by Appellant Benn, whose affidavit establishes the contract of sale was made in the District of Columbia and process was served in the district where defendants are inhabitants?

III. Whether the sworn allegations in the Complaint that Appellant Benn contracted to sell and sold securities to Appellee Borthwick in the District of Columbia in violation of Title 2, Sections 2402 and 2413, of the District of Columbia Code state a cause of action that may be tried in the District of Columbia?

IV. Should the action be transferred where there is no clear showing that the proposed transferee district is a more convenient one and that the interests of justice would be better served by a trial there?

V. Whether Appellant Kerr can rely on the agreement dated April 19, 1969, prepared by her and with her advice as attorney for appellee to revoke the earlier April 12, 1969, rescission agreement also prepared with her advice to attack the credibility of appellee's affidavit in opposition to the motions to dismiss when the complaint cites preparation of the agreements by Appellant Kerr as counsel for appellee as evidence of her participation in a scheme to defraud appellee through the sale of the securities subject of the agreements.

VI. Whether Appellant Kerr can rely on the Agreement of rescission dated April 12, 1969, prepared by her as attorney for appellee to attack the credibility of appellee's affidavit of December 12, 1969, in opposition to the Motions to Dismiss when appellant Kerr's action is cited as evidence of her participation in a scheme to defraud appellee by the sale of securities subject to the agreement?

VII. Whether Appellant Kerr legally and ethically can rely on a non-existent "docket entry" to use a document not in

the record to impeach appellee's affidavit in opposition to the Motions to Dismiss?

VIII. Whether Appellant Kerr can raise on appeal the defense that the Complaint failed to name indispensable parties when the point was not raised by Appellant Kerr below, is not supported by any showing relating to appellee, and was abandoned by Appellant Benn on appeal?

STATEMENT OF THE CASE

A. The Proceedings Below.

Mrs. Claudia H. Borthwick seeks recovery of her money, property, damages, and attorney's fees, from James T. Benn and co-defendant, Elaine W. Kerr, for the sale of securities of Capital Investors Company under an agreement made March 31, 1969, in the District of Columbia in violation of the Securities Act of 1933, the Securities Exchange Act of 1934, the District of Columbia Securities Act, and for fraud and deceit at common law. Recovery is sought by a complaint filed in the United States District Court for the District of Columbia. Service of the Summons and Complaint was made on each of the defendants in Virginia.

The Complaint charges that Appellant Benn failed to inform appellee that Capital Investors Company was not qualified to do business in Virginia or the District of Columbia; that the company was without income or current assets, and was in the process of being dissolved and was, in fact, dissolved by the State of Florida about May 19, 1969; that litigation was pending against Capital Investors and James T. Benn; that it was part of Appellant Benn's scheme to use the property obtained from appellee to obtain money from others; that certain of appellee's money was placed with Appellant Kerr for return to appellee under the guise of being paid by Capital Investors Company; that Appellant Kerr, while purporting to act for appellee

was participating in and furthering the scheme of Appellant Benn by using her professional fiduciary relationship as appellee's attorney to reassure appellee of Appellant Benn's credibility when she sought to rescind and persuaded Appellee to go along with the sales transaction while continuing to assist Appellant Benn in a scheme to obtain money, including the use of false documents purportedly executed by appellee.

Defendants Benn and Kerr moved separately to dismiss the amended complaint or, in the alternative, for an order transferring the case to the United States District Court for the Eastern District of Virginia, Alexandria Division, on the grounds (a) that the amended complaint failed to state a claim upon which relief may be granted; (b) that the court lacks jurisdiction over the subject matter of the action; (c) that service of process on the defendants beyond the territorial limits of the District of Columbia was invalid and should be quashed; (d) that venue in the District of Columbia is improper; and (e) that the amended complaint fails to join indispensable and necessary parties. After hearing, the Court denied defendants' motions to dismiss and, acting under the provisions of Title 28, USC §1292(b), granted leave to appeal, based on the opinion the denial order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal therefrom may materially advance the ultimate termination of this litigation.

Appellant James T. Benn appealed from the denial order citing as grounds the points under (a), (b), (c), and (d) referred to above in support of the motion to dismiss but abandoning any reference to point (e) for failure to join indispensable and necessary parties. An appeal from the order denying Defendant Kerr's Motion to Dismiss was consolidated for these proceedings by order filed August 14, 1970.

Appellant Elaine W. Kerr adopts points (a), (b), (c), and (d) of the Benn appeal and collaterally point (e). Appellant Kerr also seeks to have this court consider a spurious "docket entry" and material which is not contained in the trial court's docket entries or included in any affidavit or otherwise made a part of the record of the proceeding below. Appellee has moved to strike the portion of Appellant Kerr's appendix which purports to show a docket entry identifying material filed on December 10, 1969, the material referred to, and the portions of Appellant Kerr's brief relating thereto.

B. The Transactions Complained Of.

James T. Benn and Elaine W. Kerr are residents of Virginia and Mrs. Claudia H. Borthwick is a resident of Maryland, employed in the District of Columbia. The parties met in the District of Columbia, where Mr. Benn offered and sold to Mrs. Borthwick 1-1/2 shares of stock, accompanied by a promissory note and deed of trust for the face amount of $45,000, issued by Capital Investors Company, a Florida corporation organized and controlled by Mr. Benn. The 1-1/2

shares of stock represented 3% of the authorized capital shares of Capital Investors Company. Mr. Benn represented that the Company had property worth $1,450,000; that Mrs. Borthwick would receive a return on her stock investment of $1,000 per month for life, and that the $45,000 note and deed of trust would yield her 21% to 24% per annum.

In payment for the stock, note and deed of trust, Mrs. Borthwick turned over to Mr. Benn:

(a) A $2,000 certificate of deposit issued by Lincoln Federal Savings & Loan Association of Hyattsville, Maryland.

(b) $5,000 from a savings account at Eastern Savings and Loan Association in the District of Columbia.

(c) 100 shares of common stock in Marriott Corporation.

(d) 75 shares of stock of Manhattan Fund, Inc.

(e) 100 shares of stock of Southland Corporation.

(f) 904.9918 shares of stock of Investment Company of America.

(g) 378.9957 shares of Washington Mutual Investors Fund, Inc.

(h) Policy #2,687,749 issued by Penn Mutual Life Insurance Company issued on the life of the late John Borthwick, husband of Claudia H. Borthwick, having a face value of $10,000, plus interest.

(i) A warranty deed for two lots in Calvert County, Maryland, at a stated value of $7,400.

In all, these items had a current value in excess of $50,000.

The offer to sell and sale of securities were made in the District of Columbia, where an agreement was reached on March 31, 1969, and a written agreement prepared, executed and notarized (pages 11 through line 13 of page 18, Appellant Kerr Appendix).

The agreement of March 31, 1969, provided appellee an option to rescind within sixty days. Such right was exercised orally and confirmed by registered mail on April 9, 1969. A handwritten demand presented to Appellant Benn on April 5, 1969, was agreed to by him in writing, with the date changed, at his request, to April 7, 1969. On April 12, 1969, a formal typewritten rescission was prepared and executed in the office of Appellant Kerr, whom appellee had asked to represent her on Appellant Benn's recommendation. Thereafter, upon the advice and recommendation of her attorney. Appellant Kerr, Appellee signed an agreement dated April 19, 1969, revoking the rescission and empowering Appellant Kerr to act in her stead to carry out the sales agreement of March 31, 1969. This writing was "Prepared, signed and delivered by Claudia H. Borthwick's Attorney ***" Elaine W. Kerr (pages 23-26 - Appendix by Appellant Kerr).

Property obtained from appellee by Appellant Benn was transferred to another, using a paper falsely asserted to as having been signed by appellee before a notary public on April 7, 1969.

Assignments executed over signatures of appellee obtained by false representations were employed by appellants

to effect transfer of appellee's other property. Thereafter, appellee's demands for return of her property were unavailing, and this action was filed under the applicable statutes.

Appellee's action seeks a judgment to declare invalid all assignments and transfer of the property turned over to Appellant Benn and return of all of such property or compensatory and exemplary damages, costs and reasonable attorney's fees.

ARGUMENT

Point I

Whether the District Court ruled correctly and within its discretionary power in finding that service of the Summons and Complaint was valid where the United States Marshal certified appellants were served personally?

The Marshal's return certified that personal service was made on each of the appellants. The certificate of Deputy Marshal James N. McCarthy shows that James T. Benn was personally served with the Summons and Complaint at 1200 North Nash Street, Arlington, Virginia, at 3:30 PM on the 5th day of November, 1969, for which service the Marshal assessed a travel charge of $4.32 and service charge of $3.00. Marshal McCarthy certified that personal service of the Summons and Complaint on Appellant Kerr was made at 310 Hillwood Avenue, Falls Church, Virginia, at 4:00 PM on the 5th day of November, 1969, for which service the Marshal assessed a travel charge of $4.80 and service charge of $3.00. Such certified returns establish that personal service on the appellants was made

in accordance with Rule 4(d)(1) of FRCP. It is clear that the court ruled correctly and within its discretionary power that service of the summons and complaint on each of the appellants was valid. It was within the discretionary power of the court to weigh the assertion by affidavit that service on Appellant Benn was made by posting on his door against the certificate of the marshal that personal service was made and to rule on the validity of such service. Errion v. Connell, Cir. Ct. of App., 9th Cir., 1956, 236 F. 2d 447.

Upon receipt of the Summons and Complaint at his place of abode, James T. Benn appeared pro se and moved for dismissal of the Complaint or, in the alternative, for transfer to another district. His appearance and his response establish that he received notice a reasonable time before return day.

Point II

> Whether the provisions of Section 22(a) of the Securities Act of 1933 (15 USC 77v(a)) providing that any process in all suits in equity and actions at law brought to enforce any liability or duty created thereunder may be served in any other district of which defendant is an inhabitant or wherever the defendant may be found validate the service on appellants when the complaint relates to a sale admitted to have been made by Appellant Benn, whose affidavit establishes the contract of sale was made in the District of Columbia and process was served in the district where defendants are inhabitants?

Statutory authority for service of process in the district in Virginia where Appellant Benn is an inhabitant is found in Section 22(a) of the Securities Act of 1933 (15 USC 77v(a)), when an action for the illegal sale of securities

filed in the District of Columbia charges that Appellant Benn participated therein.

The complaint against Appellant is properly lodged in the District of Columbia as "the district where the offer or sale took place", as prescribed by Section 22(a) of the Securities Act of 1933 (15 USC 77v(a)). The fact that Mr. Benn participated in the offer and sales in the District of Columbia is established by Exhibit "C" to his affidavit in support of the motion to dismiss, which shows the agreement of March 31, 1969, was executed and the parties' signatures notarized in the District of Columbia (pp. 11-18, Appendix of Appellant Kerr). Paragraph 2 of the sworn amended complaint alleges that "all acts and transactions complained of originated in the District of Columbia, ***."

Section 22(a) of the Securities Act of 1933 specifically provides: "Process in such cases may be served in any other district of which defendant is an inhabitant or wherever defendant may be found."

Appellant Benn is an inhabitant of Virginia, where he was served at his place of abode. The statutory authority for such extra-territorial service of process is clear and the courts have uniformly sustained such service. Schillner v. H. Vaughn Clark & Co., (USCA, 2nd Cir. 1943), 134 F.2d 875, 879; Kardon v. National Gypsum Co., (USDC E.D. Pa. 1946), 69 F.S. 512; Thiele v. Shields (USDC S.D.N.Y. 1955), 131 F.S. 416, 420.

Appellant Benn may not rely on his affidavit in support of his motion to dismiss to prove that the offer and sale took place in Virginia without first negating the contradictory evidence presented in Exhibit "C" to such affidavit. The credibility of the appellant's affidavit was challenged by appellee at the hearing below and considered by the court before ruling. Where a fraudulent scheme is charged and denied, the credibility of the parties must be passed on by the Court. Benn v. Garfield, USDC D.C. (1968), 28 F. Supp. 524; affirmed, 133 U.S. App. D.C. 361 (1969), 410 F.2d 1060; cert. denied, 396 U.S. 1041, Jan. 19, 1970. Appellant's petitions and briefs are silent on the effect of Appellant Benn's Exhibit "C" to his affidavit.

Pages 6-8 and 18-19 of Appellant Benn's brief, and pages 5, 6, 8, 9, and 18 of Appellant Kerr's brief set out to treat the sales transaction as an "exchange" exempt from all provisions of the securities statutes invoked by the appellee. These attempts to mislabel the sales transaction ignore the statutory definitions of the transactions upon which this action rests. Section 2(3) of the Securities Act of 1933 provides, "The term 'sale' or 'sell' shall include every contract of sale or disposition of a security or interest in a security for value." Section 3(a)(13) of the Securities Exchange Act of 1934 provides, "The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

Title 2-2401(k)(1) of the District of Columbia Securities Act provides, "'Sale' or 'sell' includes every contract of

sale or contract to sell, disposition of a security or interest in a security for value."

In Appellant Benn's petition for leave to appeal, the transaction was referred to in paragraph 11, page 33, Appendix, as "*** the offer and sale about which plaintiff now complains ***."

Appellee is entitled to have her complaint alleging violations of Sections 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 heard on the causes, even though the securities in question were exempt from registration provisions of the statutes. Smith v. Jackson Tool & Die, Inc. (USCCA 5th Cir. 1969), 419 F. 2d 152, 154. Section 10(b) of the Securities Exchange Act of 1934 applies to any security. The section is not limited to the organized markets. Congress took care to make clear that Section 17(a) of the Securities Act of 1933 applies without regard to exemptions afforded from the registration provisions, including the exemption for non-public offering. Both the 1934 Exchange Act and its legislative history indicate that unless the contrary appears in a particular section, the statute's scope extends to all transactions in securities. Hecht v. Harris Upham & Co. (U.S.D.C.N.D. Calif. 1968), 283 F.S. 417, 423.

Point III

Whether the sworn allegations in the Complaint that Appellant Benn contracted to sell and sold securities to Appellee Borthwick in the District of Columbia in violation of Title 2, Sections 2402 and 2413, of the District of Columbia Code state a cause of action that may be tried in the District of Columbia?

The allegations in paragraphs 2 and 4 of the Amended Complaint that Appellant Benn contracted to sell and sold securities to Appellee Borthwick in the District of Columbia in violation of Title 2, Sections 2402 and 2413, of the District of Columbia Code, are proven by the sales agreement of March 31, 1969, prepared and executed in the District of Columbia and filed as Exhibit C to Defendant's Motion to Dismiss under Rule 12(b) and appearing in full text in Appendix filed by Appellant Kerr, pp. 11-18.

Point IV

Should the action be transferred where there is no clear showing that the proposed transferee district is a more convenient one and that the interests of justice would be better served by a trial there?

Appellants fail to make any specific showing that transfer of this action to the United States District Court for the Eastern District of Virginia would be more convenient for witnesses or parties and that the interests of justice would be better served by a trial there. The burden is on the party moving for change of venue to make a clear showing that the proposed transferee district is a more convenient one and that the interests of justice would be best served by transfer of the action. (DCSDNY 1967, Schneider v. Sears, 265 F. Supp. 257.)

Point V

Whether Appellant Kerr can rely on the agreement dated April 19, 1969, prepared by her

and with her advice as attorney for appellee to revoke the earlier April 12, 1969, rescission agreement also prepared with her advice to attack the credibility of appellee's affidavit in opposition to the motions to dismiss when the complaint cites preparation of the agreements by Appellant Kerr as counsel for appellee as evidence of her participation in a scheme to defraud appellee through the sale of the securities subject of the agreements.

Point VI

Whether Appellant Kerr can rely on the Agreement of rescission dated April 12, 1969, prepared by her as attorney for appellee to attack the credibility of appellee's affidavit of December 12, 1969, in opposition to the Motions to Dismiss when Appellant Kerr's action is cited as evidence of her participation in a scheme to defraud appellee by the sale of securities subject to the agreement?

Issues presented by Points V and VI for consideration on appeal are treated together, as they are both related to the events surrounding appellee's rescission of the sales agreement of March 31, 1969, the formalizing of such rescission, and the revocation of the rescission. All of these events relate to Appellant Kerr's activities as counsel for appellee and form the basis for the charge in the complaint that she participated as a co-schemer in Appellant Benn's plan to defraud appellee in the securities sale.

Appellee asked Appellant Kerr to act as her attorney on the recommendation of Appellant Benn. Appellant Kerr prepared the April 12, 1969, agreement to carry out appellee's rescission of the March 31, 1969, sales agreement. Thereafter, Appellant Kerr persuaded appellee to revoke the rescission by executing the April 19, 1969, agreement prepared by Appellant

Kerr with power of attorney for her to act in appellee's stead to consummate the transaction included.

Appellant Kerr would have the court deny appellee standing to challenge the transaction after its fraudulent nature became known by pointing to the language of the agreements prepared by her and designed to further the fraudulent sale. Under the circumstances, the attack on appellee's affidavit must be dismissed as untenable.

The character of the basic transaction as a sale is treated in detail on pages 11 and 12 above. No evidence in the record supports the contention that there was a secured loan agreement. The promissory note referred to in the March 31, 1969, agreement and elsewhere is a concommitant of the stock sales agreement and an inducement not to exercise the buyer's (appellee's) right of rescission.

Point VII

> Whether Appellant Kerr legally and ethically can rely on a non-existent "docket entry" to use a document not in the record to impeach appellee's affidavit in opposition to the Motions to Dismiss?

The non-existent character of the "docket entry" and related representations relied on in Appellant Kerr's Point VII of issues for consideration is taken up in the pending motion by appellee to strike such material as being outside the record. Admission of the paper referred to by Appellant Kerr as evidence on appeal, when its admissability at any stage is dubious, would deny appellee a fair hearing on the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Two copies of the foregoing Brief of Appellee were mailed, postage prepaid, this 29th day of September, 1970, to Elaine W. Kerr, Appellant, 310 Hillwood Avenue, Falls Church, Virginia, and to Edward L. Merrigan, Esq., 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006, Attorney for Appellant James T. Benn.

Smith W. Brookhart